United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

ORIGINAL

No. 75-4089
No. 75-4121

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-4089

AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,

Intervenor,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Caption continued on inside front cover)

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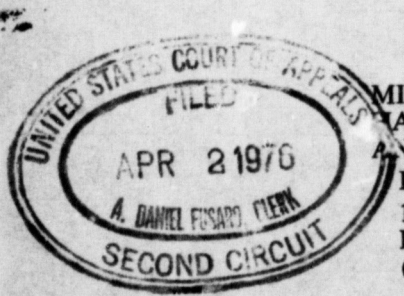
P/s

Reply Brief of the Association of Motion Picture and Television Producers, Inc.



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8

No. 75-4121

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

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Intervenor,

vs.

WRITERS GUILD OF AMERICA, WEST, INC.,

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TOPICAL INDEX

I.

II.

TABLE OF AUTHORITIES CITED

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I.
INTRODUCTION.

The Union argues that this Court should deny enforcement of the Board's order on the following basis:

1. The supervisory members of the Union employed by the employer members of the Association performed bargaining unit work during the strike;

2. The supervisory employees of the employer members of the Association were not Section 8(b)(1)(B) management representatives during the strike; and

3. Even if the supervisory members of the Union were Section 8(b)(1)(B) management representatives and performed no bargaining unit work during the strike, the Supreme Court's decision in *Florida Power & Light Co. v. IBEW, Local 641, et al.*, 417 U.S. 477 (1974), permits the Union to discipline them for crossing the Union's picket line.

II.
ARGUMENT.

A. The Supervisory Members of the Union Employed by the Employer Members of the Association Performed No Bargaining Unit Work During the Strike.

The Union contends that during the course of its strike against the employer members of the Association, the supervisory employees of the employer members of the Association engaged in the performance of struck bargaining unit work. This contention rests solely upon the unsupportable premise that the "[a] through [h]" functions which functions are expressly excluded from coverage under the parties' collective bargaining agreement, are nevertheless bargaining unit work.

1. The "[a] Through [h]" Functions Are Not Bargaining Unit Work.

The Union argues that the collective bargaining agreement between the Union and the employer members of the Association describes the "[a] through [h]" functions as "writing", and that all writing is bargaining unit work.

However, the plain language of the Agreement makes clear that the parties thereto did not intend to make all writing bargaining unit work. Thus, the Agreement carefully delineates those particular writing functions which the parties intended to be bargaining unit work: ". . . writing or preparing literary material or making revisions, modifications, or changes in literary material . . .". (GCX 2, Art. 1(B)(a)(2)). The Agreement, with equal care, delineates those *writing functions which the parties did not intend to be bargaining unit work, to wit the "[a] through [h]" functions.* Thus, Article 1(B)(a)(2) of the Agreement specifically provides that the performance of the "[a] through [h]" functions by a producer, director, story editor or any other employee "shall not be subject to this Basic Agreement and such services shall not constitute such person a writer hereunder . . .".

The Union, without recourse to any record evidence, would read the above provision to mean merely that it "does not object to supervisors performing those limited bargaining unit duties described in subsections (a) through (h)".

But Article 1(b)(a)(2) is not so limited; it does not merely allow for the performance of bargaining unit work by supervisors. Rather it carves out certain *writing functions which the parties did not intend*

to be bargaining unit work: the "[a] through [h]" functions. Under the Agreement, these functions can be performed by *any person,* not just a writer or a supervisor, employed in any capacity by an employer member of the Association.[1] Furthermore, as distinguished from bargaining unit writing, a person engaged in the performance of the "[a] through [h]" functions is not required to be a party to a contract covering their services as a "writer", nor are they compensated as a "writer" under the Agreement. (GCX 2, Art. 14A).

2. The Affected Executives, Executive Producers, Producers, Associate Producers, Directors, Research Directors and Story Editors Performed No Bargaining Unit Work During the Strike.

There is no record evidence, and the Union does not contend, that the supervisory members who worked during the strike performed any writing services other than the "[a] through [h]" functions.

As more fully set forth above, it is clear that under the Agreement the "[a] through [h]" functions were not intended by the parties to be bargaining unit work. Indeed, despite its belated assertion to the contrary, the Union must have recognized this

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[1] *Detroit Pressmen's Union, Local 13,* 217 NLRB No. 94, 89 LRRM 1141 (1975); *United Brotherhood of Carpenters, Local 14,* 217 NLRB No. 13, 89 LRRM 1002 (1975); *Bakery Workers, Local 24,* 216 NLRB No. 150, 88 LRRM 1390 (1975); *International Union of Operating Engineers, Local 9,* 213 NLRB No. 92, 87 LRRM 1247 (1974), cited by the Union in support of its argument that pre-strike performance of bargaining unit work by supervisors does not convert such work into non-bargaining unit work during the strike are distinguishable. In these cases the pre-strike work performed by the supervisor members was expressly stated to be bargaining unit work under the applicable collective bargaining agreements; the very fact that is here in issue.

fact at the time that it disciplined its supervisory members. For although a number of the Union's strike rules specifically forbade the performance of bargaining unit writing for struck employers, none of the supervisors were charged with having violated these particular rules by having engaged in the performance of the "[a] through [h]" functions. The Union made no effort to elicit any evidence, during the disciplinary hearings held for the purpose of trying "offending" supervisory members, that such members in fact performed bargaining unit writing, in the form of the "[a] through [h]" functions, or otherwise, during the strike. Nor did the Union in imposing discipline upon these supervisory members base its actions upon a finding that the members had performed any bargaining unit writing, in the nature of the "[a] through [h]" functions or otherwise.

B. The Supervisory Members of the Union Employed by the Employer Members of the Association Are Management Representatives Within the Meaning of Section 8(b)(1)(B) of the Act.

1. Executives, Executive Producers, Producers, Associate Producers, Directors and Research Directors Are 8(b)(1)(B) Management Representatives.

In its Brief in Support of Exceptions to the Decision of the Administrative Law Judge and in its Opening Brief before this Court, the Union admitted that persons in the categories of executive, executive producer, producer, associate producer, director and research director adjust, or have the authority to adjust, grievances of employees other than writers. Notwithstanding this concession the Union contends that no violation of Section 8(b)(1)(B) can be found with respect to its discipline of these supervisory employees since they

had no authority to, and in fact did not, adjust the grievances of writers. The Union's contention is without merit.

In the case of *International Organization Of Masters, Mates And Pilots v. N.L.R.B.*, 486 F.2d 1271 (CADC, 1973), the Court of Appeals for the District of Columbia directly addressed itself to, and rejected, the Union's contention:

> "Petitioner's next contend . . . that Section 8(b)(1)(B), so far as it pertains to grievance adjusters, is concerned solely with attempts by a labor organization to change the person utilized by the employer to adjust the grievances of members of that same organization. . . . We have examined the legislative history with care, and . . . we have found nothing showing that Congress intended not to reach conduct of the sort that took place in this case—conduct which all parties agree comes within the statute's literal scope." *Id.* at p. 1274.

On the basis of the foregoing, it is clear that whether the disciplined executives, executive producers, producers, associate producers, directors and research directors adjusted, or had the authority to adjust, the grievances of writers is of no significance to the disposition of this case.

2. Story Editors Are 8(b)(1)(B) Management Representatives.

The Union argues that story editors do not adjust, nor have the authority to adjust, the grievances of writers or any other employees.

However, the uncontroverted record evidence herein is that any grievances that a writer has are usually adjusted in the first instance, by the story editor. Thus, for example, when a producer or director requires that a story outline or a script be rewritten, it is the story editor who is expected to ameliorate the writer's feelings. (T 471:3-11; 570:23-571:9). Likewise, if a writer has a grievance about screen credits, initial resolution is the responsibility of the story editor. (T 236:11-24; 335:17-336:9).

The Union contends that this initial adjustment of grievances, subject as it is to appeal to higher level management or to the Union, is insufficient to constitute story editors 8(b)(1)(B) management representatives. A similar contention was considered and dismissed by the Board in *San Francisco-Oakland Mailer's Union No. 18*, 172 NLRB 2173 (1968):

> ". . . the fact is that the Charging Party has designated the foreman and, in his absence, the assistant foreman, as its *representative to make initial decisions in the adjustment of grievances* or the settlement of disputes arising under the contract, and, I find therefore that Cox, Thompson, Fraser and Bowlin are *representatives of the Charging Party within the meaning of Section 8(b)(1)(B) of the Act*[2]". (Emphasis added). *Id.* at p. 2176.

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[2]Whatever may have been the impact of the Supreme Court's *Florida Power* decision upon *Oakland Mailers*, it cannot be said to have affected the Board's holding that supervisors who are responsible for the initial adjustment of grievances are management representatives within the meaning of Section 8(b)(1)(B).

The Union's contention is, of course, also inconsistent with its concession that its supervisory members, other than story editors, adjust the grievances of employees, other than writers, even though the adjustment of grievances by executive producers, producers, associate producers and directors is often not final, but subject to appeal to higher level management, *i.e.* studio executives, or even to a neutral arbitrator.

Clearly, the initial adjustment of writer's grievances by story editors makes the story editors management representatives within the meaning of Section 8(b)(1)(B).

3. Executives, Executive Producers, Producers, Associate Producers, Directors, Research Directors, and Story Editors Adjusted, or Had the Authority to Adjust, Grievances During the Strike.

The Union contends that there is no record evidence that the disciplined supervisory members *actually engaged in the performance* of 8(b)(1)(B) functions during the strike. In such a context, the Union, relying on this Court's decision in *NLRB v. Rochester Musicians Association Local 66*, 514 F.2d 988 (CA 2, 1975), further contends that the Board's holding that it violated 8(b)(1)(B) cannot stand.

The Union's position is grounded upon a basic misunderstanding of the *Rochester* decision. This Court did not hold that a disciplined supervisor must be engaged in the actual performance of 8(b)(1)(B) functions in order to support a finding of an 8(b)(1)(B)

violation, but rather that he must have the *authority* to engage in 8(b)(1)(B) functions. As stated by this Court, ". . . . the core of [the *Rochester* case is] whether a finding of *authority* to adjust grievances or bargain collectively is a prerequisite to a §8(b)(1)(B) violation. . .". (Emphasis added)[3]. *Id.* at p. 991. The Court, answering this question in the affirmative, declined to enforce a Board order based upon a finding of a violation of 8(b)(1)(B) because the record failed "to disclose that Jones [the disciplined supervisor] had the *authority* to adjust grievances". (Emphasis added)[4]. *Id.* at p. 992.

Here in contrast, there is uncontroverted record evidence that those supervisory members of the Union who worked during the strike continued throughout to perform their normal supervisory, non-bargaining unit work, which work as set forth in Section II(B)(1) and (2), *supra,* included the adjustment, or at the very least the *authority* to adjust, employee grievances.

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[3]As further stated by this Court: "There is surely no more interference with the actual process of grievance adjustment in union discipline of a supervisor who at present plays no part in that process, than there is in discipline of one with actual *authority to adjust grievances* for performing non-supervisory work". (Emphasis added). *Id.* at p. 992-993.

[4]In *Rochester,* the Administrative Law Judge refused to admit evidence with respect to the performance, or the authority to perform, management functions by the disciplined supervisory employee. On this basis alone, the instant case is distinguishable.

C. The Union Improperly Interprets Florida Power as Permitting the Discipline of Supervisory Members Who Crossed Its Picket Line, Even Though These Members Were 8(b)(1)(B) Management Representatives and Performed No Bargaining Unit Work During the Period for Which Discipline Was Imposed.

The Union, relying on Florida Power, contends that even if the Union's supervisory members performed no bargaining unit work during the strike, they were subject to discipline for crossing the Union's picket line. However, such discipline, as demonstrated below, clearly falls "within the metes and bounds of the statutory language" of Section 8(b)(1)(B) and is proscribed. *Florida Power, supra* at p. 798.

1. The Union's Discipline of Supervisory Members Who Worked During the Strike Is Violative of the Clear Meaning of Section 8(b)(1)(B).[5]

Section 8(b)(1)(B) of the Act provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances".

As the Supreme Court pointed out in *Florida Power:*

> "The basic import of this provision was explained in the Senate Report as follows . . .

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[5]The Union asserts that in *Florida Power* the Supreme Court impliedly overruled the Board's *Oakland Mailer's* decision. Though not critical to the disposition of this case, the Association cannot let this assertion go unchallenged when it may be disspelled by even a casual reading of the Court's decision. The Court held that it could "assume without deciding that the Board's Oakland Mailers decision fell within the outer limits of . . ." Section 8(b)(1)(B). 417 U.S. 790, 805.

> this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a . . . supervisor who has been delegated the function of settling grievances[6]". *Id.* at p. 798.

The uncontroverted record evidence here shows that during the course of the strike the Union disciplined supervisors who were performing their normal supervisory and management representative functions, which functions were related to numerous bargaining units which were neither represented by the Union nor on strike. As found by the Administrative Law Judge, a finding adopted by the Board, such actions violate the clear meaning and import of Section 8(b)(1)(B):

> "*It is clear that Respondent's action in this case violated the plain meaning of the statute without the necessity of resort to statutory exegesis.* To illustrate: A person performing the function of a director acts in a managerial or supervisory capacity, which normally includes the adjustment of grievances of actors, actresses, craft employees and others. One occupying the position of a producer normally has a similar capacity and similar duties with respect to employee grievances. In addition, if the film is being shot on distant location the producer has authority to negotiate on the

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[6]Similarly, Senator Taft speaking of Section 8(b)(1)(B), stated: "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y' ". *Florida Power, supra,* at p. 803-804.

spot agreements with local unions. Thus *when Respondent prevented or sought to prevent, such hyphenate members from going to work in their managerial and supervisory capacities as producers and directors during the strike, Respondent obviously coerced and restrained their employers in the selection of those specific producers and directors for the purpose of collective bargaining and the adjustment of grievances of employees working during the strike within the plain meaning of the statute. Similarly, those persons employed as story editors* or in like classifications perform executive functions normally, and appear to have done so during the strike. . . . *Respondent, by coercing or restraining persons in these classifications from going in to do their normal work thereby actually coerced and restrained their employers from selecting those persons as the employers' representatives for the adjustment of grievances and for collective bargaining during the strike*[7]". (Emphasis added). (Appendix 175-177).

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[7]The Union contends that pursuant to Article 7(2) of the Agreement the employer members of the Association have specifically permitted supervisors to honor the Union's picket line and therefore that these employers cannot now be heard to complain when these supervisors exercised this right, either voluntarily or as a result of compulsion. This same argument was raised by the Union as an affirmative defense in its answer to the Second Consolidated Amended Complaint. The affirmative defense was expressly dropped by the Union in its Brief in Support of Exceptions to the Decision of the Administrative Law Judge. Accordingly, Section 10(e) of the Act precludes the Union from again raising this contention before the Court. Moreover Article 7(2) was clearly intended only for the protection of "writers" who chose to honor the Union's picket line. It has no bearing upon the right of employer members of the Association to select their 8(b)(1)(B) management representatives. *Cf. Bakery Workers, Local 24, supra* at p. 1392. (Member Fanning concurring).

2. Florida Power Does Not Permit the Discipline of Supervisory Members Who Crossed the Union's Picket Line and Performed No Bargaining Unit Work.

The Union reads *Florida Power* as exempting from 8(b)(1)(B) any discipline meted out to its supervisory members during or as a result of the strike. But in *Florida Power* the Court only held:

> ". . . that the Respondent unions did not violate Section 8(b)(1)(B) of the Act when they *disciplined their supervisor-members for performing rank-and-file struck work*[8]". (Emphasis added). *Id.* at p. 813.

The Court made clear that by its holding it was not placing outside the ambit of Section 8(b)(1)(B) any and all discipline of supervisory members of unions arising out of strike situations:

> ". . . a union's discipline of one of its members who is a supervisory employee can constitute a violation of §8(b)(1)(B) . . . when that discipline *may* adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer". (Emphasis added). *Florida Power, supra* at p. 804-805.

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[8]The Union, citing *IBEW Council U-4,* 193 NLRB 30, 33 (1971), maintains that in addition to performing bargaining unit work during the strike the disciplined supervisors in *Florida Power* "did collective bargaining and adjustment as well". The Union's citation is to a stipulation of the parties that the IBEW disciplined certain persons, who had been selected by their employer for the purpose of acting as its representatives in adjusting grievances and interpreting collective bargaining agreements, because these persons "*performed struck work for the Employer*". (Emphasis added).

3. The Intent of the Union in Disciplining the Supervisory Members Who Crossed Its Picket Line Is Immaterial to the Disposition of This Case.

The Union argues that even though it admittedly engaged in a course of conduct contrary to the plain language of Section 8(b)(1)(B) it cannot be held to have violated the Act because there is no record evidence of an "intent" on its part to affect the selection of management representatives by the employer members of the Association.

Section 8(b)(1)(B) does not, on its face, proscribe the finding of a violation thereof absent a showing of intent. And the Association is unaware of any decisional law, and the Union cites no such law, interpreting 8(b)(1)(B) in such a manner.

To the contrary, the Board in applying *Florida Power* has held that whether a union's discipline of one of its supervisory members constitutes a violation of 8(b)(1)(B) is dependent on the *discipline's effect* upon the supervisor's subsequent performance of his 8(b)(1)(B) functions. *Typographical Union No. 6,* 216 NLRB No. 149, 88 LRRM 1378 (1975); *Typographical Union No. 16,* 216 NLRB No. 150, 88 LRRM 1380 (1975); *Bakery Workers, Local 24,* 216 NLRB No. 150, 88 LRRM 1390 (1975).

> "The further question of 'when that discipline may adversely affect the supervisor's conduct . . .' clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed, *rather than on an evaluation of the union's motivation*". (Emphasis added). *Typographical Union No. 16,* 88 LRRM at 1379-1380.

See also *Typographical Union No. 6*, wherein

> ". . . the Board focused on the type and amount of activities performed by the supervisor-member during the strike *rather than, as urged by* [*the Union*] . . . *on the union's professed reason for imposing the discipline.*" (Emphasis added). *Id.* at p. 1385.

On the basis of the foregoing, it is clear that whatever may have been the Union's intent in imposing discipline upon supervisory members who crossed the picket line, but performed no bargaining unit work during the strike, the Union's course of conduct is in violation of Section 8(b)(1)(B).

4. There Is No Inequity in Prohibiting the Union From Disciplining Supervisory Members Who Crossed Its Picket Line to Perform Non-Bargaining Unit Work.

The Union, relying on *NLRB v. Granite State Joint Bd.*, 409 U.S. 213 (1972), contends that supervisors receive benefits from their membership in the Union and accordingly that it would be inequitable to permit them to work in any capacity, as strike-breakers[9], during the strike.[10] The Union's contention is without merit either factually or legally.

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[9]The Board addressed itself to a similar argument in *Typographical Union No. 6, supra,* wherein it held "in this same vein, it is apparent to us that it was the *performance of rank-and-file struck work by supervisor-members which the Supreme Court referred to as strikebreaking* for which union sanctions could be incurred. Therefore under our view of Florida Power and its definition of strikebreaking, the only so-called 'price' that an employer must pay for permitting a supervisor to be a union member, is that the supervisor-member cannot, with immunity, cross union picket lines to perform rank-and-file work". *Id.* at p. 1386.

[10]The Union asserts that story editors are expressly covered by Article 14B of the Agreement. In fact, Article 14B

(This footnote is continued on next page)

There is substantial record evidence herein that many of the affected executives, executive producers, producers, associate producers, directors, research directors and story editors with whom this case is concerned had done no writing whatsoever for a considerable number of years, and thus received no "substantial benefit from their membership in Respondent [Union] . . .". (Appendix 137; 174; AX 2).

Even assuming arguendo that the Union's supervisory members did receive some benefit from their continued Union membership, the Union's contention cannot stand for its reliance on *Granite State* is misplaced. In that case, and indeed in *Florida Power,* those union members who felt that the union was not adequately representing their interests, or who felt they did not wish to be bound to support the union in its economic disputes with management, were free to resign their union membership. In both *Granite State* and *Florida Power* the Court held that if a union member exercises his right of resignation, thereby voluntarily agreeing to relinquish the benefits of union membership, he is no longer subject to union discipline. Here, in contrast, the Union not only denied its supervisory members the right to resign from membership in order to retain the power to discipline;[11] it even reactivated all supervisory em-

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makes no reference whatsoever to story editors. Article 14B merely provides that "*a person employed as a writer* for a series whose duties include for that series interviewing other writers, suggesting story ideas or script changes to other writers, or recommending approval of material submitted by writers, shall be subject to this Basic Agreement" (Emphasis added). The Association does not contend otherwise.

[11]That the refusal of the Union to allow its supervisory members to resign was not alleged by the General Counsel as an independent violation of the Act, does not in any way detract from its significance in this context.

ployees of the employer members of the Association who had resigned from the Union during the previous two years.

III.
CONCLUSION.

For all of the reasons stated above, it is respectfully submitted that the Decision and Order of the National Labor Relations Board should be enforced by this Court.

Dated: March 3, 1976.

Respectfully submitted,

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Respondent.

Certificate of Service.

The undersigned hereby certifies that a copy of the REPLY BRIEF OF THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC. in the above-captioned action has this day

been served upon the following counsel at the addresses listed below:

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Executed at Los Angeles, California on March 3, 1976.

/s/ Susan K. Anderson
SUSAN K. ANDERSON

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On March 29, 1976, I served the within REPLY BRIEF in re: "American Broadcasting Companies, Inc. vs. National Labor Relations Board" in the United States Court of Appeals, for the Second Circuit, Nos. 75-4089 and 75-4121;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

ELLIOTT MOORE, DEPUTY ASSOCIATE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, 1717 Pennsylvania Avenue NW, Washington DC 20570;
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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 29, 1976, at Los Angeles, California

Kathleen E. Lenell

Service of the within and receipt of a copy thereof is hereby admitted this 29th day of March, A.D. 1976.

Proof of Service Enclosed